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No. 08-1178

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SUPREME COURT, U.S.

**In The
Supreme Court of the United States**

DONNA REID, as Personal Representative for the
Estate of JONATHAN MERLINO, deceased, and
HELEN KEARNS, as Personal Representative for the
Estate of ERIC SCOTT KEARNS, deceased,

Petitioners,

v.

NEW HAMPSHIRE INDEMNITY COMPANY,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court's grant of summary judgment in favor of NHIC based on the determination that there was no coverage for Anderson Jr. under the Policy was properly affirmed by the Eleventh Circuit Court of Appeals.

2. Whether the Eleventh Circuit Court of Appeals afforded "full faith and credit" to the prior decisions made by Florida appellate courts.

CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings are identified in the caption of the case. In accordance with SUP. CT. R. 29.6, undersigned counsel hereby states that American International Group, Inc. is the parent company of Respondent, New Hampshire Indemnity Company, Inc.

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STATEMENT OF THE CASE

A. Course of Proceedings and Dispositions in the Lower Courts

This action arose in connection with a motor vehicle accident which occurred on January 5, 2000 in Flagler County, Florida. Anderson Jr. was alleged to have been driving a motor vehicle owned by Juan Quiles with Jonathan Merlino (deceased), and Eric Scott Kearns (deceased), both riding as passengers. As a result of the accident, the passengers were killed. Defendants filed a Complaint for Wrongful Death against Anderson Jr. and Quiles in the Circuit Court, Flagler County, Florida, Case Number 02-21CA. In the interim, Anderson Jr. was criminally charged with DUI Manslaughter, and entered a plea of *nolo contendere* to the charges on July 26, 2002. Anderson Jr. was sentenced to ten years in prison, and began his sentence that day. Petitioners obtained default judgments in the underlying action against Anderson Jr. and Quiles, and subsequently received a total money judgment award of six million, five hundred thousand dollars (\$6,500,000.00) against Anderson Jr. and Quiles.

Petitioners demanded that NHIC pay the full \$6,500,000.00 judgment, alleging that the Policy issued by NHIC to Jeffery B. Anderson Sr., as the Named Insured, provided coverage for this vehicle accident because the Named Insured's son, Anderson Jr., was alleged to have been driving Quiles' vehicle. Quiles allowed his insurance on the vehicle involved

in the accident to lapse sometime prior to the accident. A declaratory judgment action was filed by NHIC to determine its rights and responsibilities under the Policy. On February 7, 2008, the U.S. District Court for the Middle District of Florida, Jacksonville Division, granted summary judgment in favor of the Respondent, stating that "Therefore, NHIC is entitled to a determination as a matter of law that Anderson Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident, and as a result is not covered under the NHIC policy. . . ." Appendix A at App. 13. On appeal to the Eleventh Circuit Court of Appeals, after oral argument before the Court, summary judgment in favor of the Respondent was affirmed. The *per curiam* holding stated that:

We have carefully reviewed the relevant Florida case law, and have compared the instant facts against the facts in those cases. We conclude that a reasonable jury would have to conclude under the facts of this case, and in light of the Florida case law, that Anderson Jr. had moved out of his parents' home and was living apart in the duplex. The fact that he was receiving some financial support from his parents is not alone sufficient to make him a member of the family under the policy and the case law.

Opinion of the United States Court of Appeals for the Eleventh Circuit, Dated and Filed September 19, 2008, at Appendix D at App. 19.

The Eleventh Circuit Court of Appeals denied Petitioners' Petition for Rehearing on December 19, 2008.

The issue is whether Anderson Jr. was an insured under the Policy at the time of the accident on January 5, 2000.

B. Statement of the Facts Relevant to the Issue Presented in Petition for Writ of Certiorari.

NHIC issued a personal automobile policy to Jeffrey B. Anderson Sr., with effective dates from April 9, 1999 to April 9, 2000. Part A of the NHIC policy provides coverage for the "Insured," defined as "You" or any "family member" for the ownership, maintenance or use of any auto or "Trailer." The policy defines "family member" in the Definitions portion of the policy, F, as "a person related to you by blood, marriage or adoption *who is a resident of your household*. This includes a ward or foster child." The policy does not define the term "resident." Appendix A at App. 3-4.¹

It is undisputed that at the time of the accident, Anderson Jr. had been living at 25B Braddock Lane

¹ A copy of the policy was attached as an exhibit to Plaintiffs'/ Respondent's Motion for Summary Judgment (Doc. 72) as well as to the Defendant/Petitioners' Response (Doc. 73).

in Palm Coast, Florida, ("the duplex") for at least eight to nine months. Anderson Sr. and C. Anderson (collectively, "the Andersons"), lived at 87 Belvedere Lane in Palm Coast, Florida, a single-family dwelling, at the time of the January 5, 2000 accident, and had been living at that address for some years.² While residing at 87 Belvedere Lane, the Andersons owned both the "A" and "B" side of the duplex located at 25 Braddock Lane in Palm Coast, Florida. While residing at 25B Braddock Lane, Anderson Jr. had three roommates: John Hall, who resided at that address only a few months; Dos Santos, who resided at that address for approximately a year, and Quiles, who became roommates with Anderson Jr. and Dos Santos after John Hall moved out, and remained for approximately nine months. While there was no written lease, the Andersons set a monthly rental charge of approximately \$600 from Anderson Jr. and his roommates for the "B" side of the duplex. Anderson Jr. and his roommates were also responsible for the utilities for the "B" side of the duplex. The electric bill was in the name of Anderson Jr. Anderson

² Prior to Anderson Jr.'s move into the "B" side of the duplex in April of 1999, it was occupied by Anderson Jr.'s grandparents. Anderson Jr.'s grandparents were on a fixed social security income and paid little to no rent to the Andersons during the time they occupied the duplex, and approximately six months after the death of her husband on October 31, 1998, Lorraine Anderson moved from the duplex to Ocala, Florida.

Jr. was responsible for his own grocery bills. Rental and utility payments were typically made in cash.

Anderson Jr. consistently paid his full rental share until the cash payments he received from his employer for an on-the-job accident suffered by Anderson Jr. ceased. Subsequent to the accident, Anderson Jr. was temporarily unemployed and was occasionally unable to pay his full share of the rent on a timely basis. Anderson Jr. continued to make utility payments for the duplex.

Anderson Jr. was employed at Top of the Line Concrete at the time of his on-the-job accident. Anderson Jr.'s hand required surgery and pins were placed in his hand/fingers. Anderson Jr. was advised by his employer that the employer would pay Anderson's medical bills as a result of the on-the-job accident, but the employer subsequently refused to do so, and Anderson Jr. began working odd-jobs and seeking employment elsewhere. Anderson Jr. subsequently filed a Workers Compensation claim against his employer as a result of the aforementioned on-the-job accident, and eventually received a settlement of approximately \$10,000.

Anderson Jr. had, in fact, been consistently employed, prior to the on-the-job accident, since his junior year in high school, and purchased his first vehicle on his own with money he earned working during the summer between his junior and senior year. Anderson Jr. moved out of the Andersons' household shortly after leaving high school, purchasing with his own money a

single-wide mobile home, which he shared with his then-girlfriend. Anderson Jr. secured placement in the U.S. Army during the foregoing time frame; after his girlfriend left him, Anderson Jr. sold the mobile home and returned to his parents' home on an *intentionally temporary basis* before his anticipated placement with the Army.³ Anderson Jr. subsequently moved to Indian Orchard, Massachusetts, where he paid \$200 per month in rent to his aunt and worked consistently until returning to Palm Coast, Florida.

Upon his return to Palm Coast from Indian Orchard in 1998, Anderson Jr. moved into his parents' home at 87 Belvedere Lane with the intent to stay at that address on only a *temporary basis*, with no intent to remain on a permanent basis. Anderson Jr. had his own vehicle and his own vehicle insurance while he stayed at the Andersons' home. Anderson Jr. began working upon his return to Palm Coast from Indian Orchard, and remained consistently employed until his aforementioned on-the-job accident. After the January 5, 2000 accident, Anderson Jr., moved into his parents' home on an *intentionally temporary basis* while recovering from his injuries, which were severe, with the intention of returning to the duplex when he recovered. After approximately two months, when he was able to care for himself, Anderson Jr.

³ Anderson Jr.'s acceptance by the U.S. Army was subsequently rescinded as a result of an altercation and criminal arrest stemming from his girlfriend's decision to leave him for another man; Anderson Jr. then moved to Indian Orchard, Mass.

returned to his home at the duplex. When Anderson Jr. moved into the duplex in April of 1999, and throughout the course of his residency at the duplex, there was no intent of or understanding on the part of the Andersons to be a source of financial support for Anderson Jr., and Anderson Jr. had no expectation of financial support from the Andersons. Anderson Sr. offered no financial support whatsoever to Anderson Jr. and C. Anderson would, on occasion, either give or loan Anderson Jr. "ten or twenty bucks here and there" or not demand immediate payment of rent, but essentially expected Anderson Jr. to support himself and had no intention of having Anderson Jr. return to the Andersons' home.⁴ Moreover, the Andersons did not claim Anderson Jr. as a dependant on their 1999 or 2000 Federal Tax Returns.

Notably, it was not unusual for C. Anderson to also give or loan money to her *friends* or *family members* when asked. Moreover, when Anderson Jr., his friends, his sisters, or any other friends of the Andersons would visit the Andersons at their home,

⁴ For purposes of ruling on NHIC's Motion for Summary Judgment, the District Court correctly assumed that Anderson Jr. sometimes paid his full rental share, sometimes made a partial rental payment, and sometimes did not pay anything toward his share, depending on his employment status. The record is undisputed that he was supposed to be paying rent to his parents to live at the Braddock duplex and that he was never threatened with eviction for any partial or non-payment. See Appendix A, Opinion and Order of the United States District Court, February 8, 2007, at App. 8.

they were usually permitted access to the refrigerator and often encouraged to share a meal. However, Anderson Jr. did not have *unfettered access* to the Anderson household, and, in fact, did not even possess a key to 87 Belvedere Lane. Anderson Jr. did not have a bedroom at 87 Belvedere. Anderson Jr. rarely, if ever, spent the night at 87 Belvedere. Moreover, Anderson Jr. did not keep any personal items at 87 Belvedere Lane. Anderson Jr. did not have keys to any of the Andersons' vehicles and did not have permission to drive their cars. The Andersons did not intend that Anderson Jr. be insured under the Policy.

When Anderson Jr. moved into the duplex in April 1999,⁵ he maintained his own insurance policy on his own vehicle, an Acura.⁶ After the Acura was damaged in an accident by Anderson Jr.'s roommate, Dos Santos, Anderson Jr. relied on his roommates, friends, and his employer for transportation. Anderson Jr. would occasionally go weeks at a time without visiting his parents' home and Anderson Sr., who stayed at home as a result of his stroke, estimated that Anderson Jr. visited the Anderson household approximately twice a month. Anderson Jr. testified that he would occasionally "Go over there and hang

⁵ The NHIC policy became effective April 9, 1999, the same month that Anderson Jr. moved into the duplex.

⁶ Anderson subsequently lost the Acura, which was co-signed by his maternal grandmother, when he could no longer make the payments, and his insurance lapsed for non-payment. This occurred before the accident.

out and just talk with them and stuff and – you know, *and then go home.*” The Andersons were not frequent visitors of the duplex and visited there only occasionally. Because his father’s stroke rendered Anderson Sr. physically unable to perform some household tasks, Anderson Jr. would occasionally assist his mother with home or lawn maintenance.⁷ Anderson Jr. was never a student, on either a full or part-time basis, throughout the entire time that Anderson Jr. lived at the duplex.

C. Summary Judgment Standard

Both the district court and the Eleventh Circuit Court of Appeals correctly determined that summary judgment was to be granted in favor of Respondent because there was a clear absence of any genuine issues of material fact, even when all the evidence was viewed in the light most favorable to the Petitioners. All motions for summary judgment are

⁷ The District Court correctly summarized that at the time of the fatal accident, Anderson Jr. did not have a key to the Andersons’ home, did not have a bedroom at the Andersons’ home nor would one have been available for his use, he rarely, if ever, spent the night there, and some of his personal items were stored in boxes in the garage. See Appendix A at App. 9. When he visited his parents’ home, Anderson Jr. was permitted to help himself to the contents of the refrigerator and he sometimes dined there with family members. The District Court stated that a jury could find that while he visited his parents’ home, he also watched television, used the swimming pool, and sometimes helped with some chores around the house. See *id.*

considered based upon the standards of review set forth by the Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). The Federal standard for evaluating motions for summary judgment is set forth in Rule 56(c), FED. R. CIV. P., which provides, in pertinent part, as follows:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(c), FED. R. CIV. P.

The burden is on the moving party to meet the standard set forth in Rule 56(c). See *Adickes v. SoHo Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970); *City of Delray Beach, Florida v. Agricultural Ins. Co.*, 85 F.3d 1527, 1529 (11th Cir. 1996). The Eleventh Circuit holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue of *material* fact when all the evidence is viewed in the light most favorable to the nonmoving party. See *Sweat v. Miller Brewing Co.*, 708 F.2d 655 (11th Cir. 1983) (emphasis added); *Matsushita Electric Industrial Corp.*, *supra*. However, “the mere

existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." See Raske v. Dugger, 819 F. Supp. 1046, 1052 (M.D. Fla. 1993) (citing Anderson, 477 U.S. at 252, 106 S.Ct. at 2512).

SUMMARY OF ARGUMENT

The Eleventh Circuit Court of Appeals correctly affirmed the district court's granting of final summary judgment in favor of NHIC because the district court correctly determined, based on the record evidence, material facts, and relevant Florida law, that Jeffery B. Anderson Jr. was not an insured under the NHIC policy of insurance issued to his parents, Christine and Jeffery B. Anderson Sr., at the time of his accident on January 5, 2000, because Anderson Jr. was not a resident of the insured's household.

ARGUMENT

- I. **THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT DETERMINING THAT NO COVERAGE IS AFFORDED TO ANDERSON JR. UNDER THE POLICY ISSUED TO ANDERSON SR. FOR THE DAMAGES ALLEGED BY THE PETITIONERS WAS PROPERLY AFFIRMED BY THE ELEVENTH CIRCUIT COURT OF APPEALS BECAUSE THERE WERE NO MATERIAL FACTS AT ISSUE TO SUPPORT PETITIONERS' POSITION THAT ANDERSON JR. WAS A RESIDENT OF THE NAMED INSURED'S HOUSEHOLD AT THE TIME OF THE ACCIDENT.**

The Eleventh Circuit Court of Appeals properly affirmed the District Court's grant of final summary judgement in favor of Respondent. As a matter of Florida law, there is no coverage afforded to Anderson Jr. under the Policy issued to Anderson Sr. for the damages alleged by the Petitioners because Anderson Jr. was not a resident of the named insured's household at the time of the accident, and was thus not an insured under the NHIC policy.

The issue of insurance policy interpretation is a recurring one in both the Florida and the Federal court systems. The basis for the trial court's jurisdiction in the instant case was Federal diversity and, therefore, the substantive law of Florida was applied. Under Florida law, the Policy is a contract of insurance. The construction and effect of a written contract

are matters of law to be determined by the Court. See *Lazzara Oil Co. v. Columbia Cas. Co.*, 683 F. Supp. 777 (M.D. Fla. 1988). "Ordinary rules of construction require [the Court], first, to assess the natural or plain meaning of the policy language at issue." *Valiant Ins. Co. v. Evonosky*, 864 F. Supp. 1189, 1191 (M.D. Fla. 1994) (quoting *Landress Auto Wrecking Co., Inc. v. United States Fidelity & Guaranty Co.*, 696 F.2d 1290, 1292 (11th Cir. 1983)). Here, the interpretation and application of the definition of "family member" in the policy, as it applies to the instant issue of coverage, was within the exclusive jurisdiction of the district court.

The issue of residency under an insurance policy is typically a factual matter. However, when the facts are essentially undisputed, the district court may determine whether a family member is a resident as required for coverage under the policy. See Appendix A at App. 4 (citing *State Farm Fire and Casualty Co. v. Nickelson*, 677 So.2d 37, 38 (Fla. 1st DCA 1996); *Kepple v. Aetna Casualty and Surety Co.*, 634 So.2d 220, 221 (Fla. 2d DCA 1994)). Based upon the testimony of all witnesses, the material facts surrounding the issue of residency of Anderson Jr. at the time of the accident are essentially undisputed. Therefore, the trial court correctly determined, and the Eleventh Circuit Court of Appeals correctly affirmed, that as a matter of law Anderson Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident as required for coverage under the NHIC Policy, as he had not resided there on any

permanent basis for at least eight months prior to the accident, and he had no present intent to return to the Anderson household at the time of the accident.

Although arising in a divorce action, the following statement of the Florida Supreme Court in *Kiplinger v. Kiplinger*, 2 So.2d 870 (Fla. 1941) is often quoted by courts when ruling on the residency issue in the insurance context:

The residence of a party consists of *fact and intention*. *Warren v. Warren*, 73 Fla. 764 (1917). Residence indicates place of abode, whether permanent or temporary. *Minick v. Minick*, 111 Fla. 469, 149 So. 483. A resident is one who lives at a place *with no present intention of removing therefrom*. *Tracy v. Tracy*, 62 N.J. Eq. 807 (1901).

Kiplinger at 873. (Emphasis added.)

In determining the issue of residency in the present case, both the district court and the Eleventh Circuit Court of Appeals correctly applied the guidelines set forth in *General Guarantee Ins. Co. v. Broxsie*, 239 So.2d 595 (Fla. 1st DCA 1970), and agreed with the criteria set forth by the trial judge for determining the issue of residency, as follows:

What appears to distinguish a person as a resident or non-resident is that the resident is more than a mere visitor or transient, but lives at a place with additional attachments of such significance as to render that person a more or less consistent part of the community.

Broxsie at 597.

In addition to the additional significant attachments consideration, the *Broxsie* court created a three-part test for determining residency. That test, now the hallmark test of residency cases in the context of insurance coverage in Florida, was correctly applied by the District Court in this case, and states the following:

Those merely dwelling under the same roof does not constitute them members of the same household, but such is the result when they share common bonds of kinship *and also share the facilities of the house for living purposes. The three ingredients are (1) close ties of kinship; (2) a fixed dwelling unit; and (3) enjoyment of each part of the living facilities.* The main thread of a household or family is the sharing of companionship and of the living facilities of the dwelling unit by the members of the household.

Broxsie at 597. (Emphasis added.)

The deposition testimony taken of every witness in the instant action makes it clear beyond question that Anderson Jr. was not a member of the named insured's household. Indeed, the facts support only part *one* of the *Broxsie* test – close ties of kinship as the named insured's son. However, absolutely none of the remaining criteria for residency as a member of the named insured's household are met by the facts in this case. The District Court reviewed all the deposition testimony, affidavits, and evidence submitted,

and found that the essential material facts surrounding the issue of residency of Anderson Jr. at the time of the accident are undisputed. To the extent that facts are disputed, the Court noted them, viewed them in the light most favorable to the Petitioners, and correctly found that they are not material, in that they would not support a reasonable jury finding in favor of the Petitioners.

A. Anderson Jr. was not living in or a part of the fixed dwelling unit of the named insured.

It is undisputed that Anderson Jr. lived at 25B Braddock Lane – the duplex – for at *least* eight months prior to the accident. It is also undisputed that the named insured/the Andersons lived at 87 Belvedere Lane and had lived at that address for years prior to the accident. The duplex and the Andersons' single family home were not connected, were not on the same plot or lot, and in fact were not even on the same street, nor were the separate residences utilized on a regular basis by all the family members. In no way could the separate abodes be combined to be considered a "fixed dwelling unit" of any kind, and mere ownership of both dwellings by the named insured fails to support a finding that these wholly separate dwellings were a "fixed dwelling unit."

B. Anderson Jr. did not share enjoyment of each part of the living facilities – whether at 25B Braddock Lane or 87 Belvedere Lane – with the named insured.

The evidence overwhelmingly shows that Anderson Jr. did not share enjoyment of each part of the living facilities of the named insured's home. Anderson Jr. did not have his own key to the Andersons' home and thus could not simply "come and go" as he desired; he only visited the home infrequently, rarely more than twice in one week, and often did not visit for weeks at a time. Likewise, the Andersons' visits to Anderson Jr.'s home at 25B Braddock Lane were even more infrequent. Finally, Anderson Jr. did not have a bedroom at the Andersons' home and did not utilize the home for storage of his personal belongings. Certainly, when Anderson Jr. did visit his parents' house, he was allowed to go into the kitchen and "raid the fridge;" the same open invitation was extended by the Andersons to any family member or visitor. Moreover, any family member or friend was invited to share a meal with the Andersons. However, such invitations hardly constitute *sharing of enjoyment of each part of the living facilities* as contemplated by the *Broxsie* court and others when determining residency in the insurance context. There was no evidence that Anderson Jr. shared enjoyment of each part of the living facilities of the named insured's home, and the trial court correctly found that there

was no genuine issue as to any material fact regarding Anderson Jr.'s residency.

C. Anderson Jr. was a mere visitor or transient at his parents' home with no significant attachments rendering him a consistent part of the community.

All the testimony from the witnesses makes it clear that Anderson Jr. was a mere visitor or transient regarding the Andersons' household and did not have significant additional attachments which would render him a consistent part of the household community. Anderson Jr. maintained none of his personal possessions at the named insured's household, did not have a key to enter the household on his own, did not have a bedroom at the Andersons' home, and his sporadic visits to the household evidences that he was not a consistent part of the household community. Anderson Jr. was nothing more than an occasional visitor to the home of the Andersons.

D. Anderson Jr. had no present intent to return to the named insured's household at the time of the January 5, 2000 accident.

All the evidence indicated that Anderson Jr. had no present intent to return to the Anderson household at the time of the accident, and only returned to the household *after* the accident for assistance while

recovering from the injuries he sustained. The evidence shows that as soon as Anderson Jr. was able to care for himself, within two months, he returned to the duplex. Further, the evidence shows that the Andersons did not intend for Anderson Jr. to return to their household at the time of the accident. Because neither Anderson Jr. nor his parents intended for Anderson Jr. to return to the Anderson household at the time of the accident, there is no genuine issue as to any material fact regarding Anderson Jr.'s residency, and NHIC is entitled to summary judgment as a matter of law.

E. There are no genuine issues of material fact in the instant case that meet the criteria considered by the courts for a determination of residency.

The case law and evidence argued by the Petitioners in support of their appeal of the final summary judgment entered by the District Court fail to adequately address the *Broxsie* standards, and fall far short of showing anything other than close ties of kinship between Anderson Jr. and his parents. Even in many cases where no coverage has been afforded due to lack of residency, there is some connection between the insured and the relative claiming benefits under the insured's policy. However, Florida courts have consistently rejected residency claims in cases where the connection was far stronger than the

case at hand.⁸ Necessarily, relatives who are found to be covered under insurance policies where the residency issue has arisen have much closer ties to the family unit than those in which the relative has been excluded from coverage.⁹ The uncontroverted sworn testimony of all the witnesses in the instant action,

⁸ See *Whitten v. Allstate Insurance Co.*, 476 So.2d 794 (Fla. 1st DCA 1985) (no coverage for son under mother's automobile policy even though son physically resided in mother's household for three months prior to accident while separated from wife); *Sembric v. Allstate Insurance Co.*, 434 So.2d 963 (Fla. 4th DCA 1983) (no coverage for nephew under uncle's insurance policy where uncle resided with nephew in Florida seven weeks out of the year); *Cavalier Ins. Corp. v. Bailey*, 292 So.2d 67 (Fla. 3d DCA 1974) (daughter not entitled to uninsured motorist benefits under father's policy of insurance while living in separate household with divorced mother for 1-1/2 years); *Griffin v. General Guarantee Insurance Co.*, 254 So.2d 574 (Fla. 3d DCA 1971) (no coverage for uncle under nephew's insurance policy even though uncle resided with nephew three or four days per week).

⁹ See *Seitlin & Co. v. Phoenix Insurance Co.*, 650 So.2d 624 (Fla. 3d DCA 1994) (son, a *full-time student*, covered under parents' homeowners policy where son treated parents' home as permanent residence, *maintained room and possessions* at parents' home, and parents were *sole financial support.*); *Kepple v. Aetna Casualty and Surety Co.*, 634 So.2d 220 (Fla. 2d DCA 1994) (daughter entitled to uninsured motorist coverage as a resident of parents' household where daughter and husband resided in *enclosed carport attached to parents' home* and had *free access* to parents' home with *no separate utilities, address, or mailbox*); *Alava v. Allstate Insurance Co.*, 497 So.2d 1286 (Fla. 3d DCA 1986) (son of divorced parents a resident of both households where son spent significant time in both mother's and father's households and clear intent of parents that son maintain relationship with both parents).

however, makes it clear that Anderson Jr. was *not* a resident of the Andersons' home at the time of the accident, even when construing "residency" as liberally as permitted in common usage so as to give effect to the intentions of the parties and purposes of the insurance. See *State Farm Mutual Automobile Ins. Co. v. Johnson*, 536 So.2d 1089 (Fla. 4th DCA 1988).

Viewing the facts of the instant matter alongside facts of the most potentially analogous cases argued by the Petitioners in the lower courts and in the Petition, wherein coverage has been found by a Florida court, the connections between Anderson Jr. and the Andersons are clearly insufficient to consider Anderson Jr. to be a resident of the household of the Andersons for purposes of insurance coverage. For example, in *Sutherland v. Glens Falls Ins. Co.*, 493 So.2d 87 (Fla. 4th DCA 1986), cited by the Petitioners' Petition for Writ of Certiorari at pp. 11 and 17, the insured's son had moved into his own apartment shortly prior to becoming involved in an accident for which he sought uninsured motorist benefits under his mother's policy of insurance. See *id.* The named insured, his mother, paid the full rent for her son's apartment until approximately two weeks after the accident, *all* of the insured's son's clothing, other than work clothes, was at the named insured's residence, the insured's son ate either *at work or at his mother's residence*, and there was no telephone at the insured's son's apartment. Further, testimony indicated that the insured's son was "testing the waters – trying to determine if he could live independently from his

mother," and that he had stated that he *intended* to return to his mother's home. *See id.* The facts showed that Sutherland was unquestionably more than a mere visitor or transient at his mother's home; rather, he spent as much time at his mother's house as he spent in the apartment she rented for him, had significant attachments to the home, was a consistent part of the community, and intended to return to that household community.

In the instant case, in no way was Anderson Jr. simply "testing the waters" at 25B Braddock Lane; he moved from his parents' home shortly after high school and never intended to return to the Andersons' household on a *permanent* basis. Anderson Jr. returned twice, on an *intentionally temporary* basis, to the Andersons' home since first moving out after high school — while awaiting his assignment from the Army and returning from Indian Orchard, just before moving to 25B Braddock Lane. Anderson Jr. maintained consistent employment during and since high school. Anderson Jr. had been living separate and apart from his parents' household well before the time that the accident occurred. Unlike Sutherland, Anderson Jr. did not routinely and consistently eat his meals at the Anderson household, had no personal possessions at the Anderson household, and his parents had *no* intent to pay his rent or financially support him. Anderson Jr. had *no present intent* to return to the Andersons' household at the time of the accident and was a mere visitor or transient at his

parents' home – he had no key to the home, no possessions in the home, and visited the home on a sporadic basis.

Petitioners fail to discern vital facts regarding the *Broxsie* standards in their mistaken reliance on *Row v. United States Automobile Association*, 474 So.2d 348 (Fla. 1st DCA 1985). In *Row*, the Court looked to the extraordinary circumstances to find that Mark Row was a member of his father's household so as to be covered under his father's policy of insurance for UM benefits. Mark's divorced father owned and lived in an apartment complex consisting of 12 one-bedroom apartments, contained within three quadraplexes located on the same plot of land. *See id.* Mark lived with his father in his apartment since 1978, began experiencing *signs of mental illness* at that time, and over the next three years, Mark was jailed, hospitalized, and transferred to several institutions for treatment of his *on-going* mental illness. Mark's father assumed the responsibility for Mark's hospital costs incurred as a result of Mark's mental illness, and Mark was actually released to his father's care in 1981. *See id.* Mark made a failed single attempt to live separate and apart from his father, but returned in two months. By that time, *all* of the "Row children" lived at the apartments; they *all* had *master keys* to the family apartments; they could come and go into all of the family apartments as they pleased, and while they slept in individual apartments, they considered the family apartments "the family dwelling." *See id.* Mark, specifically, maintained *no utilities* at his

apartment, and used his father's apartment to cook, eat, bathe, and socialize – essentially, everything but sleep. *See id.*

Notably, Mark continued to suffer mental disturbances and was *unable* to work as a result of his ongoing mental illness and, in fact, had never held a job for more than a week and a half. Mark was essentially *mentally incapable* of caring for himself, and relied on his father for *all* means of support, including financial and emotional support. *See id.* Determining Mark was a member of his father's household, the *Row* court found, utilizing the *Broxsie* test, that the proximity of the apartments on the same plot of land and contained within three adjacent quadraplexes was sufficient to constitute a fixed dwelling. All of the "Row children" had keys *and* the use and enjoyment of all the family apartments, and specifically Mark enjoyed the use of his father's apartment for everything but sleeping. The court did not deem Mark a mere visitor or transient because of Mark's daily use of his father's apartment and his significant attachments to the family dwelling. Finally, there was *no* evidence that either Mark or his father had any present intent at the time of the accident for Mark's living arrangements to change.

None of the facts in the instant action are similar to the extraordinary set of circumstances in *Row*. Row's on-going mental illness prevented him from caring for himself; his lack of employment is no basis of comparison to Anderson Jr.'s temporary lack of employment. Anderson Jr.'s on-the-job injury presented

a temporary employment set back; however, Anderson Jr. performed other odd jobs he was physically capable of performing in order to earn income and maintain residency at the duplex, and he intended to return to full-time employment. Unlike Anderson Jr., Row's on-going mental illness *prevented* him from maintaining any employment whatsoever.

Anderson Jr. did not live in a "family compound" environment enjoyed by the Row children; none of Anderson Jr.'s siblings shared his duplex or the "A" side of the duplex during the eight to nine months that Anderson Jr. lived at the duplex before the accident. The ability of Anderson Jr. and others to help themselves to the Andersons' refrigerator on the occasions that he visited hardly rises to the level of sharing a part of each of the living facilities enjoyed by Mark Row in consistently utilizing his father's apartment for essentially *every* activity but sleeping.

Petitioners' reliance on *Patterson v. Cincinnati Insurance Company*, 564 So.2d 1149 (1990), cited by the Petitioners at page 10 in support of their Petition for Writ of Certiorari, is also misplaced. In *Patterson*, the issue before the Court was whether Melissa Patterson and her parents made a material misrepresentation to their insurance company regarding their daughter's residency status in order to obtain uninsured motorist benefits. The court determined that there was an issue of fact regarding the issue of material misrepresentation on the part of the insured parents, finding that it was incumbent upon the parents/insureds to advise Cincinnati that their

daughter had access to the insured vehicles; and because they failed to do so, the Pattersons had misrepresented their daughter's status as a driver in their household when the parents' policy was renewed. Because such a misrepresentation was material to Cincinnati's acceptance of the risk, the court granted Cincinnati's motion for summary judgment. The First District Court of Appeal found that the evidence regarding her residency could point in either direction, thus summary judgment was improper.

The facts surrounding the *Patterson* case have no bearing on the question of whether Anderson Jr. was insured under the NHIC policy of insurance at the time of the subject accident. There are no allegations of material misrepresentation by the insured parents in this action, neither the insured parents nor Anderson Jr. attempted to obtain any benefits from NHIC, and both the district court and the Eleventh Circuit Court of Appeals determined that based on the material facts presented, no reasonable jury could find that Anderson Jr. was a resident of his parents' household at the time of the accident.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT AFFORDED "FULL FAITH AND CREDIT" TO THE PRIOR RULINGS OF THE DECISIONS MADE BY FLORIDA APPELLATE COURTS.

Florida courts, including the Florida Supreme Court, have clearly delineated the factors that must

be considered when determining residency. The district court and the Eleventh Circuit Court of Appeals applied the applicable Florida state law citing the factors considered by Florida state courts of appeal, and correctly determined that Anderson Jr. was not a resident of the policy holders' home.

U.S.C. § 1652. **State laws as rules of decision**, provides that "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." A federal court sitting in diversity jurisdiction applies state law of the state in which it sits. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938); *Miller v. Anheuser Busch, Inc.*, 591 F. Supp.2d 1377 (S.D. Fla. 2008); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S.Ct. 2505 (1986). The applicable substantive law will identify those facts that are material. *Id.* at 248. Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. *Id.*

Moreover, the district court and the Eleventh Circuit Court of Appeals properly applied federal *procedural* law – the law of the forum – regarding the summary judgment at issue. "According to *Erie* . . . it is clear that federal courts are bound only b[y] the substantive law of the states and *not* the state *procedural* rules." *Baird v. Celis*, 41 F. Supp.2d 1358, 1359

(N.D. Ga. 1999) (emphasis added). After *Erie*, the federal courts struggled in distinguishing between “substantive” requirements to which state law applied and “procedural” requirements that were governed by federal law. In *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136 (1965), the United States Supreme Court ruled that federal courts sitting in diversity should apply the Federal Rules in diversity cases, even though the Federal Rules may conflict with state laws that seem to have a substantive effect. Therefore, Petitioners’ argument that the district court and Eleventh Circuit Court of Appeals failed to afford “full faith and credit” must fail. The district court and the Eleventh Circuit Court of Appeals correctly and appropriately applied the Federal Rules of Civil Procedure in the instant action – specifically, Rule 56, FED. R. CIV. P.¹⁰



¹⁰ In addition, it should be noted that Rule 56, Summary Judgment, FED. R. CIV. P. and Rule 1.510, Summary Judgment, FLA. R. CIV. P., are virtually identical, and have been for decades. “This rule is substantially the same as former Rule 1.36 as amended and Federal Rule 56.” Rule 1.510, FLA. R. CIV. P., Authors’ Comment – 1967. The Federal and Florida standards applied to the judicial proceedings, as well as the standards governing summary judgment, are identical. Therefore, the outcome of the summary judgment at issue would not have changed regardless of which rule – Federal or Florida – had been applied.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Rule 10 of the Supreme Court provides:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory power.

....

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

SUP. CT. R. 10.

Rule 10 further notes, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioners have failed to provide any compelling reason for the granting of a Writ of Certiorari in this action. The opinions and orders in this action do not conflict with those of other United States Courts of Appeals, nor do they conflict with Florida State substantive and procedural law. The opinions and orders did not depart from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory power. There is no important question of either federal or state law. Rather, the Petitioners have asserted that the error of the district court and Eleventh Circuit Court of Appeals essentially consists of "erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* In sum, no compelling reason of any kind exists for the granting of a Writ of Certiorari in the instant action.

CONCLUSION

Petitioners' Petition for Writ of Certiorari should be denied because there is no compelling reason for the Petition to be granted. The district court and the Eleventh Circuit Court of Appeals appropriately applied the substantive law of Florida and Federal procedural rules in making a determination as to the granting of summary judgment in favor of the Respondent, finding that none of the facts in evidence in the instant case support a finding that Anderson Jr.

was a member of the named insured's household at the time of the accident of January 5, 2000. Even when viewing the evidence in a light most favorable to the Petitioners, the lower courts correctly found that the evidence fails to rise above a mere scintilla in support of the Petitioners' position that Anderson Jr. was a member of the named insured's household at the time of the accident so as to be an insured under the Policy. The lower courts reviewed all the evidence, deposition testimony, affidavits, and exhibits, and found that the nature of Anderson Jr.'s visits to his parents' home and other contacts with his parents evidence strong bonds of kinship, but do not rise to the level of enjoyment of each part of the living facilities as contemplated by the *Broxsie* and other courts when determining residency in the insurance context, see Appendix A at App. 12; that "the financial support and contacts are best characterized as evidencing strong bonds of kinship, rather than any present intent to reside with his parents," *id.*; and "a reasonable jury could only reach the conclusion that Anderson Jr. was a visitor or transient. . . ." *Id.* at App. 13. Therefore, final summary judgment in favor of NHIC by the district court, and the affirmation of same by the Eleventh Circuit Court of Appeals, was proper,

and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX A

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

NEW HAMPSHIRE IN-
DEMNITY COMPANY, INC.,

Plaintiff,

vs.

DONNA REID, as Personal
Representative of the
Estate of Jonathan Merlino,
deceased, HELEN

CASE NO.:

KEARNS, as Personal
Representative of the
Estate of Eric Scott Kearns,
deceased, JOHN P.

3:05-CV-1280-J-12MCR

MERLINO, JEFFREY
BRUCE ANDERSON, JR.,
and JUAN QUILES, III,

Defendants, /

OPINION AND ORDER

(Filed Feb. 8, 2007)

This case comes before the Court on Plaintiff's Motion for Summary Judgment (Doc.72) requesting a determination on its Complaint for Declaratory Relief (Doc.1) that Jeffrey Bruce Anderson, Jr. (Anderson, Jr.) is not an insured under the New Hampshire Indemnity Company, Inc. (NHIC) policy of insurance issued to his father, Jeffrey B. Anderson,

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Sr. (Anderson, Sr.), as the named insured. Plaintiff asserts that Anderson, Jr. was not a covered resident member of the household of Anderson, Sr. and his wife (Anderson, Jr.'s mother), Christine Anderson (the Andersons), on January 5, 2000, when he was involved in a fatal car accident.¹ Defendants, Donna Reid (Donna Reid Lunsford) and Helen Kearns, the representatives of the estates of the two young men killed in the accident, filed a memorandum in opposition to the motion for summary judgment (Doc.73). These two Defendants obtained a Final Judgment (Doc.73, Exh.4) against Jeffrey Bruce Anderson, Jr. and Juan Quiles, III, in the amount of \$3,000,000.00 each. That Final Judgment also awarded John P. Merlino \$500,000.00 against Jeffrey Bruce Anderson, Jr. and Juan Quiles, III. Following oral argument by the parties and after considering the facts, evidence, and law applicable to this matter, the Court will grant Plaintiff's Motion for Summary Judgment for the reasons set forth below.

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue of a material fact and that the moving party is entitled to judgment as a

¹ The ruling on Plaintiff's Motion for Summary Judgment also resolves the Defendants' Counterclaim contained in Doc. 33, as it seeks a determination by the Court that Anderson, Jr. was a covered resident member of the Andersons' household and therefore insured under the NHIC policy.

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matter of law." FED.R.CIV.P. 56(c). The burden is on the moving party to meet the standard set forth in Rule 56(c). See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In the Eleventh Circuit, summary judgment should only be granted where the moving party has sustained its burden of showing the absence of a genuine issue of material fact when all the evidence is viewed in the light most favorable to the nonmoving party. See *Sweat v. Miller Brewing Co.*, 709 F.2d 665, 656 (11th Cir. 1983). An issue of fact is genuine only if a reasonable jury considering the evidence presented could find for the non-moving party. Material facts are those which will affect the outcome of the trial under governing law. "[T]he mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." See *Raske v. Dugger*, 819 F.Supp. 1046, 1052 (M.D.Fla.1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

NHIC issued a personal automobile policy to Anderson, Sr., with effective dates from April 9, 1999 to April 9, 2000.² Part A of the policy provides coverage for the "Insured," defined as "You or any "family member" for the ownership, maintenance or use of any auto or "trailer." The policy defines "family member" as "a person related to you by blood, marriage or

² A copy of the policy is attached as an exhibit to Plaintiff's Motion for Summary Judgment (Doc.72) as well as to the Defendants' response (Doc.73).

adoption who is a resident of your household. This includes a ward or foster child." The policy does not define the term "resident."

Plaintiff contends that Anderson, Jr., was not a resident of the Andersons' household at the time of the accident on January 5, 2000, and therefore was not insured under the NHIC policy. Defendants contend that Anderson, Jr. was a resident of both a duplex on Braddock Lane, as well as the Andersons' home on Belvedere Lane, and therefore was insured under the NHIC policy at the time of the accident.

The construction and effect of a written contract are matters of law to be determined by the Court. *See Lazzara Oil Co. v. Columbia Cas. Co.*, 683 F.Supp. 777 (M.D.Fla.,1988). "Ordinary rules of construction require [the Court], first, to assess the natural or plain meaning of the policy language at issue." *Valiant Ins. Co. v. Evonosky*, 864 F.Supp. 1189, 1191 (M.D.Fla.1994) (*quoting Landress Auto Wrecking Co., Inc. v. United States Fidelity & Guaranty Co.*, 696 F.2d 1290, 1292 (11th Cir.1983)). While the NHIC policy at issue in this case does contain a definition of "family member," it does not define "residency" which is required in order for the policy to provide coverage for such family member.

The issue of residency under an insurance policy is typically a factual matter. However, when the facts are essentially undisputed, the Court may determine whether a family member is a resident as required for coverage under the policy. *See State Farm Fire and*

Casualty Co. v. Nickelson, 677 So.2d 37, 38 (Fla. 1st DCA 1996); *Kepple v. Aetna Casualty and Surety Co.*, 634 So.2d 220, 221 (Fla. 2nd DCA 1994).

In *General Guarantee Ins. Co. v. Broxsie*, 239 So.2d 595 (Fla. 1st DCA 1970), the Court set forth guidelines for determining residency that have been utilized by many courts in the context of automobile insurance coverage. The Court also utilizes the *Broxsie* guidelines in determining whether or not Anderson, Jr. was a resident of the Andersons' household at the time of the fatal accident of January 5, 2000.

In *Broxsie*, the First DCA stated that "[w]hat appears to distinguish a person as a resident or non-resident is that the resident is more than a mere visitor or transient, but lives at a place with additional attachments *of such significance* as to render that person a more or less *consistent part of the community*." *Broxsie* at 597 (emphasis added). The *Broxsie* court identified three important considerations in determining residency: 1) close ties of kinship; 2) a fixed dwelling unit; and 3) enjoyment of each part of the living facilities. *Id.*

The *Broxsie* also court noted that the residence of a party is a matter of both fact and intention, so it is important to consider the intent of the parties in making a residency determination. *Id.* (citation omitted). The issue of whether or not a person "lives at a place with no present intention of removing therefrom" is question that must be answered looking at the facts of the particular case. *Id.* (citations omitted).

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The Broxsie court also observed that the term “resident of the same household” is ambiguous as employed by automobile insurance policies and “should be considered in its most inclusive sense.” *Id.* (citation omitted).

The Court has reviewed all the deposition testimony submitted, including that of Anderson, Jr., Anderson, Sr., and Christine Anderson, as well as the affidavit of Donna Reid Lunsford (Reid Affidavit), and finds that the essential material facts surrounding the issue of residency of Anderson, Jr. at the time of the accident are undisputed.³ To the extent that facts are disputed, the Court notes them, views them in the light most favorable to the Defendants, and finds that they are not material, in that they would not support a reasonable jury finding in favor of the Defendants. The Court summarizes the facts below.

Anderson, Jr. lived at the Braddock Lane duplex for at least eight months prior to the accident.⁴ The duplex and the Andersons’ single family home on

³ Citations to the record for the undisputed facts can be found in Plaintiff’s Motion for Summary Judgment (Doc.72), pp. 5-12.

⁴ Since approximately age 18, Anderson, Jr. had moved in and out of his parents’ home several times before moving to the Braddock duplex in April 1999, and also stayed there after the accident to recuperate from his injuries. Anderson, Jr.’s intent was to live on his own, but various circumstances had him return to live with his parents until he could re-establish his own residence. See e.g., Depo. of Anderson, Jr., at p. 88; Depo. of Christine Anderson, at pp. 29-30.

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Belvedere Lane were separate residences on different streets and not a "fixed dwelling unit".⁵

⁵ The Court views the term "fixed dwelling unit" in its most inclusive sense, recognizing that, for the purposes of insurance coverage, Florida court determinations of residency since *Broxsie* have not imposed a hardline rule requiring that the proposed resident actually reside in the same physical dwelling household as the named insureds, that is, Florida courts have found that a person may be a "dual resident" of both the named insured's household and a separate dwelling. However, for the reasons stated in this opinion, the Court finds that the facts in this case are clearly distinguishable from those cases where Florida courts have found residency despite separate dwelling units, and do not support a finding in this case that Anderson, Jr. was a resident of the Andersons' household. Cf, e.g., *Dwelle v. State Farm Mutual Automobile Insurance Company*, 839 So.2d 897 (Fla. 1st DCA 2003) (at time of accident the named insured's son was a full-time college student, physically residing with his parents at his parents' home at the time of the accident, parents were intended sole source of financial support, son had not abandoned his parents' home, and parents claimed son as a dependant on their tax returns); *Seitlin & Co. v. Phoenix Insurance Co.*, 650 So.2d 624 (Fla. 3rd DCA 1994) (holding son, a full-time student, covered under parents' homeowners policy where son treated parents' home as permanent residence, maintained room and possessions at parents' home, and parents were sole financial support.); *Kepple v. Aetna Casualty and Surety Co.*, 634 So.2d 220 (Fla. 2nd DCA 1994) (holding daughter entitled to uninsured motorist coverage as a resident of parents' household where daughter and husband resided in enclosed carport attached to parents' home and had free access to parents' home with no separate utilities, address, or mailbox); *Alava v. Allstate Insurance Co.*, 497 So.2d 1286 (Fla. 3rd DCA 1986) (holding son of divorced parents a resident of both households where son spent significant time in both mother's and father's households and clear intent of parents that son maintain relationship with both parents); *Row v. United States* (Continued on following page)

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Anderson, Jr. shared the Braddock Lane duplex with various roommates. Though there was no written lease, the Andersons, who owned the duplex, charged Anderson, Jr. and his roommates \$600 per month for the "B" side of the duplex, where they lived. All utilities were the responsibility of Anderson, Jr. and his roommates. The electric bill was in the name of Anderson, Jr., and Anderson, Jr. was responsible for all of his own personal bills, including utilities and groceries.

The record is disputed about whether Anderson, Jr. consistently paid his full share of the rent. For purposes of ruling on Plaintiff's Motion for Summary Judgment, the Court assumes that Anderson, Jr. sometimes paid his full rental share, sometimes made a partial rental payment, and sometimes did not pay anything toward his share, depending on his employment status. The record is undisputed, however, that he was supposed to be paying rent to his parents to live at the Braddock duplex and that he was never threatened with eviction for any partial or non-payment.

Automobile Association, 474 So.2d 348 (Fla. 1st DCA 1985) (apartment complex owned by father was considered "family dwelling" for mentally ill son and other siblings, even though son slept in a separate apartment where son relied on father for emotional and financial support, son used father's apartment for everything except sleeping so was no mere visitor or transient, and there was no evidence of father's or son's intent at the time of the accident for son's living arrangements to change.).

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His parents only occasionally visited Anderson, Jr. at the Braddock Lane duplex. The frequency of Anderson, Jr.'s visits to his parents' home on Belvedere Lane is disputed, ranging from an estimate of several times a week to sometimes no visits for weeks at time. Again, for purposes of ruling on Plaintiff's Motion for Summary Judgment, the Court assumes that a jury could find that Anderson, Jr. visited the Andersons' home several times each week.

At the time of the fatal accident, Anderson, Jr. did not have a key to the Andersons' home, did not have a bedroom at the Andersons' home nor would one have been available for his use, and rarely, if ever, spent the night there.⁶ Some of his personal items were stored in boxes in the garage. When he visited his parents' home, Anderson, Jr. was permitted to help himself to the contents of the refrigerator and he sometimes dined there with family members. Despite various conflicting statements, the Court also assumes that a jury could find that while he visited his parents' home, he also watched television, used the swimming pool, and sometimes helped with some chores around the house.

⁶ In their response to Plaintiff's Motion for Summary Judgment (Doc.73), the Defendants assert that Donna Reid Lunsford's affidavit supports the fact that Anderson, Jr. sometimes slept in a recreational vehicle that was parked at the Andersons' Belvedere Lane home. The Court finds no such statement in her affidavit. Christine Anderson stated that she was not aware of Anderson, Jr. ever sleeping in the recreational vehicle. Depo. of Christine Anderson at p. 78.

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The deposition testimony of Anderson, Jr., Anderson, Sr., and Christine Anderson regarding their intent as to the residency of Anderson, Jr. is unanimous and uncontroverted in the record. Anderson, Jr. stated that he considered the Braddock Lane duplex his home and that even before moving there he only stayed at his parents' Belvedere Lane home temporarily pending his ability to establish his home elsewhere.⁷ See *e.g.* Depo. of Anderson, Jr. at pp. 36, ll 8-10, pp.71-72 and 88.

When Anderson, Jr. moved into the Braddock Lane duplex in April of 1999, and throughout the course of his residency at the duplex, Anderson, Sr. offered no financial support. Christine Anderson, his mother, sometimes on a weekly basis, would give or loan Anderson, Jr. "ten or twenty bucks here and there." Christine Anderson also never threatened to evict Anderson, Jr. for partial or nonpayment of rent.⁸ The Andersons expected Anderson, Jr. to support himself and had no intention of having Anderson, Jr.

⁷ The Defendants cite as evidence that Anderson, Jr. was a resident of the Andersons' Belvedere Lane address the ambulance report for Anderson, Jr. on the date of the fatal accident which shows Belvedere Lane as his address. Doc. 73, Exh. 9. The Court finds that this document is not probative of Anderson, Jr.'s residency because there is no indication of who provided the information contained in the report. Moreover, the report states that Anderson, Jr. was ejected from his vehicle, sustained multiple injuries, and his verbal ability was "confused."

⁸ She also provided money to post \$10,000 bail when Anderson, Jr. was arrested in September 1999.

return to their household on a permanent basis.⁹ See e.g. Depo. of Christine Anderson at pp.29-30; Depo. of Anderson, Sr. at pp. 11, 24 and 31.

In addition, Anderson, Jr. did not have keys to any of the Andersons' vehicles.¹⁰ Anderson, Sr. did not intend that Anderson, Jr. be insured under the NHIC policy.¹¹ See e.g. Depo. of Christine Anderson at pp.26 and 28; Depo. of Anderson, Sr. at p. 23. When Anderson, Jr. moved into the Braddock duplex in April 1999,¹² he maintained his own insurance policy on his own vehicle, an Acura.¹³ Moreover, the Andersons did

⁹ In fact, according to Donna Reid Lunsford, Christine Anderson said that she was tired of supporting her son. Reid Affidavit.

¹⁰ Donna Reid Lunsford claims to have seen Anderson, Jr. drive one of the Andersons' vehicles and Anderson, Jr. stated he drove his mother's vehicle approximately three times. Depo. of Anderson, Jr. at p.33. Assuming this is true, such evidence is insufficient, in light of the record before the Court to permit a jury to find that Anderson, Jr. was a resident of the Andersons' household.

¹¹ In fact, the first time Anderson, Jr. moved out of his parents' home when he was approximately 18 years old, Christine Anderson filled out paperwork with their automobile insurance company at that time to remove him from the policy because he was no longer living in their household. Depo. of Christine Anderson at pp.28 and 65.

¹² The NHIC policy became effective April 9, 1999, the same month that Anderson, Jr. moved into the duplex.

¹³ Anderson subsequently relinquished possession of the Acura for failure to make his car payments, and his insurance lapsed for non-payment. This occurred before the accident.

not claim Anderson, Jr. as a dependant on their 1999 or 2000 Federal Tax Returns.

This Court is of the opinion that the nature of Anderson, Jr.'s visits to his parents' home and other contacts with them evidence strong bonds of kinship, but do not rise to the level of enjoyment of each part of the living facilities as contemplated by the *Broxsie* and other courts when determining residency in the insurance context. Likewise, the financial and other support that the Andersons provided does not rise to the level of sole support or dependency to establish that he or they had the present intention that he reside in their Belvedere home, but rather evidences the contrary intent by all parties that he maintain a separate residence apart from his parents at the Braddock Lane duplex. The financial and other support¹⁴ he received from his parents in fact enabled Anderson, Jr. to continue to maintain his residence outside his parents' home and not become a consistent part of the community of the Andersons' Belvedere Lane home. Viewing all of the evidence in the light most favorable to the Defendants, the Court concludes that the financial support and contacts are best characterized as evidencing strong bonds of kinship, rather than any present intent to reside with

¹⁴ In addition to the support the Court has described, such support could also include Christine Anderson doing Anderson, Jr.'s laundry, as claimed by Donna Reid Lunsford and disputed by other testimony, but that would not change the Court's conclusion.

his parents. The Court is of the opinion that on the record before the Court, a reasonable jury could only reach the conclusion that Anderson, Jr. was a visitor or transient with regard to the Andersons' household, and that he did not have significant additional attachments which would render him a consistent part of the household community as contemplated by *Broxsie*. Anderson, Jr. had not resided there with "no present intention of removing therefrom" (*Broxsie* at 597) for at least eight months prior to the accident, and neither he nor his parents had any present intent that he return to the Anderson household at the time of the accident.

Therefore, NHIC is entitled to a determination as a matter of law that Anderson, Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident, and as a result is not covered under the NHIC policy; and further, based on the foregoing, the Court will grant summary judgment as a matter of law in favor of the Plaintiff. Accordingly, it is

ORDERED AND ADJUDGED:

1. That Plaintiff's Motion for Summary Judgment (Doc.72) is granted and the Court determines that Jeffrey Bruce Anderson, Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident, and therefore is not covered under the NHIC policy; and
2. That entry of Final Judgment is hereby deferred pending Plaintiff's written notification to the

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Court by February 26, 2007, regarding the status and proposed disposition of the case regarding the remaining three Defendants who have not appeared in this case: John P. Merlino, Jeffrey Bruce Anderson, Jr., and Juan Quiles, III.

DONE AND ORDERED this 7th day of February 2007.

/s/ Howell W. Melton
HOWELL W. MELTON
United States District Judge

Copies to:
Counsel of Record

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APPENDIX B

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

NEW HAMPSHIRE IN-
DEMNITY COMPANY, INC.,

Plaintiff,

vs.

DONNA REID, as Personal
Representative of the
Estate of Jonathan Merlino,
deceased, HELEN
KEARNS, as Personal
Representative of the
Estate of Eric Scott Kearns,
deceased, JOHN P. MER-
LINO, JEFFREY BRUCE
ANDERSON, JR., and
JUAN QUILES, III,

CASE NO.:

3:05-CV-1280-J-12MCR

Defendants.

ORDER

(Filed Mar. 15, 2007)

On February 8, 2007, the Court entered an Opinion and Order (Doc.96) granting the Plaintiff's Motion for Summary Judgment (Doc.72). It is now,

ORDERED:

That the Clerk shall enter Final Judgment in favor of the Plaintiff and against the Defendants

Donna Reid, as Personal Representative of the Estate of Jonathan Merlino, deceased, and Helen Kearns, as Personal Representative of the Estate of Eric Scott Kearns, deceased, with costs to be assessed according to law, based on the Court's determination as a matter of law that Jeffrey Bruce Anderson, Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident, and as a result is not covered under the New Hampshire Indemnity Company policy.

DONE AND ORDERED this 14th day of March 2007.

/s/ Howell W. Melton
Senior United States
District Judge

Copies to:
Counsel of Record

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APPENDIX C

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

**NEW HAMPSHIRE
INDEMNITY
COMPANY, INC.,**

Case No.

3:05-cv-1280-J-12MCR

Plaintiff,

-vs-

DONNA REID,

Defendant.

/

JUDGMENT IN A CIVIL CASE

(Filed Mar. 16, 2007)

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to this Court's Order, entered on March 15, 2007, Judgment is entered in favor of the Plaintiff, New Hampshire Indemnity Co., Inc., and against the Defendants, Donna Reid, as Personal Representative of the Estate of Jonathan Merlino, deceased, and Helen Kearns, as Personal Representative of the Estate of Eric Scott Kearns, deceased, with costs to be assessed according to law, based on the Court's determination as a

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matter of law that Jeffrey Bruce Anderson, Jr. Was not a resident of the named insured's household at the time of the January 5, 2000 accident, and as a result is not covered under the New Hampshire Indemnity Company policy.

Date: March 16, 2007

SHERYL L. LOESCH, CLERK

/s/ Patrick Divita

By: Deputy Clerk

Copy to:

Counsel of Record

Unrepresented Parties

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APPENDIX D

**United States Court of Appeals
For the Eleventh Circuit**

No. 07-11731

District Court Docket No.
05-01280-CV-J-12-MCR

**NEW HAMPSHIRE INDEMNITY
COMPANY, INC.,**

Plaintiff-Counter-Defendant-Appellee,

versus

DONNA REID,
as Personal Representative of the Estate
of Jonathan Merlino, deceased,
HELEN KEARNS,
as Personal Representative of the Estate
of Eric Scott Kearns, deceased,

Defendants-Counter-Claimants-Appellants.

JOHN P. MERLINO, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida

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JUDGMENT

(Filed Sep. 19, 2008)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: September 19, 2008

For the Court: Thomas K. Kahn, Clerk

By: Harper, Toni

ISSUED AS MANDATE

DEC 29 2008

U.S. COURT OF APPEALS

ATLANTA, GA.

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-11731

D. C. Docket No.
05-01280-CV-J-12-MCR

NEW HAMPSHIRE INDEMNITY
COMPANY, INC.,

Plaintiff-Counter-
Defendant-Appellee,

versus

DONNA REID, as Personal
Representative of the Estate
of Jonathan Merlino, deceased,
HELEN KEARNS, as Personal
Representative of the Estate
of Eric Scott Kearns, deceased,

Defendants-Counter-
Claimants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(September 19, 2008)

Before ANDERSON, BARKETT and HILL, Circuit Judges.

PER CURIAM:

After oral argument and careful consideration, we conclude that the judgment of the district court is due to be affirmed. We have carefully reviewed the relevant Florida case law, and have compared the instant facts against the facts in those cases. We conclude that a reasonable jury would have to conclude under the facts of this case, and in light of the Florida case law, that Anderson, Jr. had moved out of his parents' home and was living apart in the duplex. The fact that he was receiving some financial support from his parents is not alone sufficient to make him a member of the family under the policy and the case law.

AFFIRMED.

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APPENDIX E
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-11731-BB

**NEW HAMPSHIRE INDEMNITY
COMPANY, INC.,**

Plaintiff-Counter-Defendant-Appellee,

versus

DONNA REID,
as Personal Representative of the Estate
of Jonathan Merlino, deceased,
HELEN KEARNS,
as Personal Representative of the Estate
of Eric Scott Kearns, deceased,

Defendants-Counter-Claimants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Dec. 19, 2008)

**BEFORE: ANDERSON, BARKETT and HILL, Cir-
cuit Judges.**

PER CURIAM:

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The petition(s) for rehearing filed by Appellants
is DENIED.

ENTERED FOR THE COURT:

/s/ Rosey Burkett
UNITED STATES CIRCUIT JUDGE
